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IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1099

CHESTER BASS, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF AND OPPOSITION

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The Petitioner, CHESTER BASS, makes and files, by Counsel, this PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF AND OPPOSITION and for grounds therefor would show the following:

I.

Petitioner, with due apologies to the Court, failed to point out that Art. 40.09, Section 13, Vernon's Annotated Texas Code of Criminal Procedure, provides:

> Upon refusal of the [trial] court to grant defendant a new trial, the clerk shall thereupon promptly transmit the record and briefs to the Court of Criminal

> Appeals, in which court all grounds of error and arguments in support thereof urged in defendant's brief in the trial court shall be reviewed, *as well as any unassigned error which in the opinion of the Court of Criminal Appeals should be reviewed in the interest of justice.* (Emphasis added).

The Court of Criminal Appeals, to the knowledge of this Petitioner's counsel, has never defined the phrase "in the interest of justice." By the cases, it is not the same as "of Constitutional dimensions" although it may be; nor is it "fundamental error" although it may be; and, in general, it is submitted, it is whatever the majority of the voting members of the Court deem it to be, including but not limited to Counsel even raising the ground of error either on direct appeal or in an Application For Leave to File the Motion for Rehearing or what was previously simply the Motion for Rehearing. For example, in the early case of *McClellen v. State,* 1967, 413 S.W.2d 391, then Presiding Judge Woodley said:

> For this Court to review any ground of error urged in the defendant's brief filed in the trial court other than such as in the opinion of this Court should be reviewed as unassigned error would be to ignore the salutary provisions of the 1965 Code whereby the trial judge is allowed full opportunity to examine the completed record, hear arguments and study briefs and grant a new trial to the same extent as would this Court should he decide that the defendant should not be permitted to withdraw his notice of appeal.
>
> We hold that in declining the trial judge's decision permitting him to withdraw his appeal and be granted a new trial, appellant waived all grounds of error

> save those which may be considered by this Court as unassigned errors.
>
> Deprivation of constitutional right such as set forth in defendant's brief as his first ground of error is, in the opinion of this Court, an error which should be reviewed in the interest of justice, though unassigned.

Later, in *Keel v. State*, 1968, 435 S.W.2d 687 (690), Judge Dice said:

> Upon the refusal of the trial court to grant a new trial, it becomes the duty of this court to review the rulings of the trial judge, in light of the record and the briefs, and any unassigned error which in the opinion of this court should be reviewed in the interest of justice. Art. 40.09-13, supra.
>
> The Court of Criminal Appeals is not bound to confine itself to the record sent up by the trial court in passing upon a federal claim, such as denial of a constitutional right. White v. State, Tex. Cr. App., 410 S.W.2d 440.

In *Duckett v. State*, 1970, 454 S.W.2d 755, (758), the Court reversed even though the ground of error on which the case was reversed was not even submitted by counsel for that defendant; in fact, he determined the appeal to be frivolous and without merit. Now Presiding Judge Onion said:

> The question here presented was not raised as an error that "might arguably support the appeal" in appellant's counsel's brief in which he determined the appeal to be frivolous or in the pro se brief except as the same might be germane to the general claim of the ineffective assistance of counsel.

> We are not precluded from reviewing the same, however, since the question involves both a violation of the State as well as the Federal Constitutions and would certainly require our review "in the interest of justice." See Article 40.90, Sec. 13, V.A.C.C.P.

In fact, counsel for an appellant does not even have to raise the ground of error if the Court sees fit to review it "in the interests of justice." In *Thomas v. State*, 1971, 474 S.W.2d 236 (237), the Court reversed because the complaint on which an information was founded was fatally defective. There, Commissioner Dally said:

> In the interest of justice the fundamental errors which have been designated above but which were not assigned as grounds of error in a brief filed in the trial court have been considered under the provisions of Art. 40.09, Sec. 13, Vernon's Ann. C.C.P.
>
> The judgment is reversed and the prosecution ordered dismissed.

In *Stoddard v. State*, 1972, 475 S.W.2d 744 (746), a search warrant case, which was reversed, Judge Roberts of the Court said:

> Appellant raises only one ground of error in his untimely filed brief. He contends that the trial court erred in admitting evidence which was obtained as the result of a search of his automobile. He contends that the search was unlawful because of a defective search warrant and that probable cause did not exist for the issuance of the warrant. This ground of error will be considered as unassigned error. Art. 40.09, § 13, V.A.C.C.P.; Heltzel v. State, 462 S.W.2d 289 (Tex. Cr. App. 1971); Dodd v. State, 436 S.W.2d 149 (Tex. Cr. App. 1969); Johnson v. State, 436 S.W.2d 906 (Tex. Cr. App. 1968).

Again, if the majority of the voting members of the Court of Criminal Appeals deems some ground of error should be reviewed in the interest of justice, whether raised or not, timely or not timely, it will be reviewed, but not otherwise. This is true even on Motion for Rehearing. In *Renn v. State*, 1973, 495 S.W.2d 922 (924), the Court, on rehearing, reversed because of the prosecutor's jury argument among other things. Judge Odom, writing for a majority of the Court, said:

> On rehearing, appellant relies upon his last ground of error which was not considered in the original opinion because of noncompliance with Article 40.90, Sec. 9, Vernon's Ann. C.C.P. He now strenuously argues this ground of error and urges that his case should be reversed for prosecutorical misconduct just as Stein v. State, Tex. Cr. App., 492 S.W.2d 548, was reversed for prosecutorial misconduct of the same prosecutor. We agree.
>
> Without going into the repeated improper questions and arguments of the prosecutor during the trial, suffice it to say that the record is replete with such remarks as: "hippy"; "anti-Christ"; "Swastika"; and, "Communist". It is noted that the court correctly sustained at least twenty-six objections to such remarks. Motions for mistrial were overruled.
>
> The prosecutor's venture outside the record is even more alarming in the instant case than in Stein v. State, supra. And, this is another of those ". . . numerous cases where improper arguments and sidebar remarks by the prosecutor have forced us to reassert the critical importance of convicting an accused only upon that evidence presented, without attempting to inflame or prejudice the minds of the jurors." 492 S.W.2d at page 551.

> The motion for rehearing is granted, the judgment of affirmance is set aside and the judgment is reversed and the cause remanded.

If the majority of the voting members of the Court of Criminal Appeals deem a ground of error untimely raised or raised for the first time in a Motion for Rehearing or in the Application for Leave to File Motion for Rehearing (there is no former, only the latter regarding motions for rehearing, at the present time in Texas), the Court will simply not write on the ground by so stating, will ignore the ground by not so stating, or will decline the Appellant leave to file his motion for rehearing. Usually, however, the opinion reads as follows:

> Appellant's remaining grounds of error were brought forth in a supplementary brief which was not filed in the trial court. We have carefully examined same and have found nothing therein which merits review in the interest of justice, under Article 40.09, Section 13, V.A.C.C.P. Nilsson v. State, 1972, 477 S.W.2d 592 (600).

Of course, the Court of Criminal Appeals recognizes as binding upon it only "the decisions of the United States Supreme Court, the only court whose decisions are binding on this court." See *Delorme v. State*, 1973, 488 S.W.2d 808 (813). Even a majority opinion of the Supreme Court of Texas is not controlling on the court in the opinion of some members of the Court. See Judge Morrison's dissenting opinion in *Seiffert v. State*, 1973, 501 S.W.2d 124, (130). "I cannot bring myself to agree that this Court should consider as authoritative the opinion of the Supreme Court of this State in *Goldstein v. Union National Bank*, 109 Tex. 555, 213 S.W.

584 (1919)." Thus, if this Honorable Court has not seen fit, at this time, specifically and directly to write on the issues presented in the cause at Bar, the Court of Criminal Appeals may have felt that as this Honorable Court has not spoken, there was no need for it to speak in response to Appellant's Application for and Motion for Rehearing. Cf. Ex parte Ates. 487 S.W.2d 353 (Tex. 1972).

It is also interesting to note that the State of Texas, through her Counsel, for authority, as to the contentions raised herein, has cited authority from without the State, excluding the citations from this Honorable Court, when the highest Criminal Court in the State of Texas has recently reaffirmed that it is not bound by "inferior United States Court[s]." See *Turner v. State,* 1973, 497 S.W.2d 593 (594).

Thus, in reply and conclusion, it should be sufficiently clear that under State procedure, Petitioner did present the question of notice to the Court of Criminal Appeals in a proper and timely manner.

II.

Petitioner would further show that since the filing of his Petition for Writ of Certiorari, the Court of Criminal Appeals has now held that *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), as interpreted by that Court, does not entitle a probationer in Texas to a preliminary hearing to determine probable cause prior to the final hearing on the motion to revoke probation. A certified copy of the decision of *Grant v. State,* No. 48, 129A, February 13, 1974, opinion by Judge

W. A. Morrison, is attached to this reply brief as Exhibit A."

III.

Respondent says that "The state's original motion and first amended motion to revoke probation further specified that the embezzlement resulted from Petitioner's taking $45.00 belong to John Carter." This is true as to motions filed, but it should be pointed out that *this is not the Motion to Revoke Probation on which the State chose to go to trial on.* That Motion merely alleged: "THAT said defendant committed the offense of MISDEMEANOR EMBEZZLEMENT on or about August 31, 1968." (p. 52 of Petitioner's Application). Petitioner was thus subject to every embezzlement case which occurred in Harris County, Texas, between June 14, 1968, and August 31, 1968; a county of almost two million citizens, and the State was not restricted to any embezzlement which may have occurred involving John Carter.

Further, in reply to the Respondent's contention that neither double jeopardy nor its off-shoot, collateral estoppel, are applicable to this case, it is unknown by this record for what reason the trial judge continued the probationer on probation. There is absolutely nothing in the Record on Appeal to show that "the trial court exercised its discretion so as to continue the probation *should the charges against the Petitioner subsequently either be dismissed or the Petitioner be acquitted of them.*" (Emphasis added).

IV.

Petitioner concedes the possible question of the retroactivity of Morrissey and Gagnon is present here as this

Honorable Court has not deemed it appropriate to so state one way or the other. Petitioner is also aware there are a number of Courts, both State and Federal, which have held that these two decisions are not retroactive. See and compare, in addition to the three cases cited by Respondent, the following:

> See Horstmen v. State, 210 N.W.2d 427, Iowa, 1973. Other courts have reached the same conclusion: Parker v. Cardwell, 289 N.E.2d 382 (Ohio App., 1973); Rogers v. Hurley, 486 S.W.2d 696 (Ky. App., 1972); Griffin v. California Adult Authority, 464 F. d 602 (9th Cir., 1972); People Ex. Rel. Marino v. Carscles, 346 N.Y.S.2d 634, N.Y. App., 1973.

However, can it be argued that the benefits flowing from the two decisions were not meant to encompass those cases pending on appeal at the time they were rendered? Morrissey, supra, was decided on June 29, 1972, and Gognon, supra, was decided on May 14, 1973. Petitioner's probation was revoked on February 18, 1972. Even Respondent concedes that "Petitioner was entitled to notice of the revocation hearing." (p. 8 of Brief). Does not notice through the pleadings of what the State alleges against a probationer relate to "the very integrity of the fact-finding process?" Is the right to adequate and sufficient notice not at least on a par with the right to counsel? Petitioner says it is. Cf. *McConnell v. Rhay*,, and *Stiltner v. Rhay*, 393 U.S. 2, 21 L.Ed.2d 2, 89 S.Ct. 32.

As to the claim of non-retroactivity made by the Respondent, Petitioner would show that when Circuit Courts of these United States are holding retroactive such issues

as a hearing on placement in punitive segregation where a person is already in prison and subject to prison life, can it be argued that the claim of notice does not apply to probationers whose cases were pending on appeal at the time of this Court's decisions in *Morrissey*, supra, and *Gagnon*, supra? See and compare the elequent and well written decision of Chief Judge Swygert of the Seventh Circuit in *Adams v. Carlson*, 1973, 488 F.2d 619, commencing at page 625, on the issue of retroactivity. Petitioner's counsel can say no more than what Judge Swygert has already said and refer the Court to that decision which he now does.

In all candor to this Honorable Court, Petitioner had been convicted and a conviction was on appeal for a misdemeanor embezzlement charge, when the first hearing was held. See the Court of Criminal Appeals' original opinion in this Cause, and see also *Bass v. State*, 1971, 464 S.W.2d 668. Also, again, there is nothing to show why the trial court continued the Petitioner on probation. He just did, and the very same evidence adduced at that hearing was used at the second hearing to revoke Petitioner's probation. The additional instruments mean little, if anything, to the contentions raised herein.

Respondent concludes his "Brief in Opposition" with the statement:

> "Respondent submits that it would be unfortunate to punish the action of the trial court which attempted to protect the Petitioner by refusing to revoke his probation until the court had evidence that the offense for which the probation was revoked was a final conviction."

Petitioner would show that the trial court could have held his ruling in abeyance if that were a problem; or could have done a number of things. But, that is the point. That was not done. What could have been done and what was done should be the only concern of this Honorable Court.

Petitioner, in conclusion, says that it would also be unfortunate, in hypothetical fashion, if some probationer paid a $25.00 fine for driving an automobile without a valid Texas driver's license only a couple of days after he received his probation; then, a hearing was held to revoke, but the trial court saw fit not to revoke a ten (10) year probation; and then, almost ten (10) years later, the probationer was summoned back before the Court and the trial judge felt he had erred at the earlier hearing and then revoked for the prior indiscretion on the part of the probationer even though nothing else was shown to be a violation of his probation. This, too, would be most unfortunate and that is why this case can be the vehicle to see that such cases in the field of probation and/or parole law remain hypothetically rather than become a reality. Cf. *Oaks v. Wainwright,* Florida Supreme Court, December 20, 1973, 14 Cr. L. Rep. 2344, where that Court held "A parolee who pleaded *nolo contendere* to a drunkenness charge did not thereby surrender his right to the preliminary revocation hearing required by *Morrissey v. Brewer,* 408 U.S. 471, 11 Cr. L. 3324."

CONCLUSION

For all the reasons stated herein, Certiorari should be granted in this Cause. The ruling and Judgment of the Court of Criminal Appeals of the State of Texas, made and entered on November 21, 1973, should be reversed

and this Cause should be remanded to the said Court of Criminal Appeals of Texas to enter an Order reversing its former Judgment and remanding this Cause for new hearing to the 178th Judicial District Court of Harris County, Texas.

Respectfully submitted,

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CERTIFICATE OF PROOF OF SERVICE

I, Marvin O. Teague, Attorney for Petitioner, Chester Bass, hereby certify that a copy of the foregoing Petitioner's Reply Brief to Respondent's Brief and Opposition has been deposited in the United States Mail, postage prepaid, certified, and properly addressed to Respondent's Counsel, Honorable John L. Hill, Attorney General of the State of Texas, State Supreme Court Building, Austin, Texas, to the attention of Lonny Zwiener, Assistant Attorney General, this the _____ day of March, A.D. 1974.

Marvin O. Teague

APPENDIX

NO. 48,129-A

DONALD RAY GRANT, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Harris County

OPINION

The offense is felony theft; the punishment, five (5) years.

This is an appeal from an order revoking probation.

Appellant's brief filed in the trial court concluded that this appeal was frivolous and complied with the terms of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and Gainous v. State, Tex. Cr. App., 436 S.W.2d 137 (1969).

Thereafter, appellant's court appointed counsel on appeal sent this Court, without presenting same to the trial court, a supplemental brief in which he seeks to invoke the holding of the Supreme Court of the United States in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), and asks for a reversal because as he contends appellant was not afforded a preliminary hearing held to determine probable cause prior to the final hearing on the motion to revoke probation.

The affidavit attached to the supplemental brief is not properly before this Court. Booth v. State, 499 S.W.2d 129. We decline to discuss appellant's contention as he

requests under Art. 40.09, Sec. 13, V.A.C.C.P., other than to observe that his contention has been answered adversely to him in our recent opinion in Ex parte Shivers, 501 S.W.2d 898.

The judgment is affirmed.

MORRISON, Judge

(Delivered February 13, 1974)

(Seal)

A True Copy
Attest:
Glenn Haynes, Clerk
Court of Criminal Appeals of Texas

By: Tommy Lowe
Deputy